

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Arthur D. NEILSON NO. Z-706856

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1908

Arthur D. NEILSON

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 15 September 1971, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. the specification found proved alleges that while serving as a Second Steward on board the SS SANTA MERCEDES under authority of the document above captioned, on or about 21 November 1970 while the vessel was at sea, Appellant did wrongfully molest a minor male passenger, by applying an electric vibrator to his person, while engaging him in conversation about sexual matters.

Appellant failed to appear at the first two sessions of the hearing. At the third session, Appellant appeared and elected to act as his own counsel. He entered a plea of not guilty to the charge and specification. He also appeared at the fourth and fifth sessions, but not the sixth and the final sessions.

The Investigating Officer introduced in evidence testimony of the master, depositions of the male passenger, his mother, and another passenger, and a certified extract from the shipping articles of the vessel.

In defense, Appellant offered in evidence a letter from the National Maritime Union. No formal defense was presented. Appellant failed to appear at four of the seven sessions of the hearing.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He entered an order revoking all documents issued to Appellant.

The entire decision was served on 1 October 1971. Appeal was timely filed on 6 October 1971.

FINDINGS OF FACT

On 21 November 1970, Appellant was serving as a Second Steward on board the SS SANTA MERCEDES and acting under authority of his document while the ship was at sea.

A minor male of 15 years of age was a passenger on board SANTA MERCEDES on a voyage which included the date of 21 November 1970. He was accompanied by his mother and a friend. The minor met Appellant when he asked the latter for assistance in the use of a flash attachment for his camera. At about 2130 on 21 November 1970, Appellant invited the minor to his cabin to witness the process of developing photographs. While alone in the cabin, Appellant asked him whether or not he was a "conformist" or had ever had sexual relations with a female. While continuing this line of conversation, Appellant produced a "vibrator" and applied it to the minor's person. The latter pushed it away, but Appellant insisted that he try it. Fearing physical harm, the minor temporarily acquiesced, but shortly returned to his stateroom.

He then telephoned his mother in the lounge and summoned her to their stateroom. As she entered, he began to cry and related the incident to her. She summoned another passenger who found the minor very nervous and upset. Having been told of the incident, the passenger related it to the chief Steward and the Master. The Master proceeded to the minor's stateroom, where he found him pale and trembling and his mother very agitated and angry. After the minor described the incident, the Master summoned the ship's doctor, who prescribed tranquilizers for the minor and his mother. At about midnight, the Master spoke to Appellant who replied that the Master knew him "better than that." Shortly thereafter, the Master commenced a lengthy log entry which was completed in Appellant's presence on 26 November 1970. Appellant made a reply at that time. However, the log entry does not appear on the record, because it was later removed from the logbook by an unknown person, who mutilated the book.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) no evidence was produced regarding the alleged misconduct;
- (2) no entry was made in the official log of the vessel concerning the alleged misconduct:

- (3) the Master did not interview Appellant on the night of the alleged misconduct;
- (4) Appellant was under the influence of alcohol and not responsible for his actions on the night of 21 November 1970;
- (5) Appellant is four years short of pension eligibility, is sorry for his actions and requests to sail on vessels without passengers;
- (6) Appellant received neither the depositions nor notice of the final hearing session; and
- (7) it is unconstitutional to deprive Appellant of his livelihood.

APPEARANCE: Appellant, pro se.

OPINION

There is more than ample, uncontradicted evidence on the record to support the findings of the Administrative Law Judge. the uncontradicted testimony of the victim amounts, in and of itself, to "substantial evidence of a reliable and probative character." 46 CFR 137.20-95(b).

Appellant's contentions concerning the existence of a log entry and the time of his interview by the Master are adequately refuted by the evidence on the record. In fact, this appeal is hardly the proper forum for an attack on previously unchallenged and uncontradicted evidence. It is also difficult to imagine what relevance the interview could bear to Appellant's guilt or innocence of the alleged misconduct. The existence or non-existence of a log entry is equally irrelevant to the finding in this case, which is supported by other substantial evidence. Decision on Appeal No. 1618.

Appellant's contention that intoxication excuses his actions is also improperly raised on appeal. there is no evidence on the record that he either was intoxicated or had consumed a large amount of alcohol. In any event, it is well settled that voluntary intoxications is no defense.

Appellant seeks clemency in view of the short period remaining until his eligibility for a retirement pension. However, the equities of this case, Appellant's cavalier approach to the hearing and the seriousness of the misconduct involved (46 CFR 137.03-5) do

not warrant such clemency. It is also noted that there is no provision in the applicable regulations for a document restricting service to vessels without passengers. Such would be an administrative impossibility. Appellant's proper approach for redocumentation is through the application procedures set forth in 46 CFR 137.13.

Finally, Appellant has in no way been denied his constitutional rights. His document has been revoked via the duly constituted procedures set forth in 46 CFR 137, which afford the full measure of due process demanded for the revocation of what amounts to a privilege rather than a property right. While there is a possibility that Appellant never received the depositions and the notice of the final hearing session, such receipt was in any event unnecessary for due process in this case. Before the close of the fifth session, Appellant, who was then present, was informed of the time, date and place of the sixth session. He failed to appear at the sixth session, but sent a telegram which not only failed to present adequate excuse for his absence, but expressly waived any further right to appearance. The hearing was then properly continued "in absentia," all facts relevant to notice and failure to appear having been placed on the record. 46 CFR 137.20-25.

CONCLUSION

The Administrative Law Judge made a non-prejudicial error of judgment when he mailed the depositions and notice of the final session to the appellant. At that time the hearing was properly continued in absentia, and no contact with Appellant was necessary. Had Appellant attended the sixth session, he would have received the depositions and notice of the final session in person. by his failure to appear, he forfeited his rights in this regard and cannot now be heard to complain. Mailing of the depositions was purely superfluous; notice of the final sessions was purely superfluous. If anything, Appellant was thus afforded a higher degree of due process than such license revocation proceedings require. This can in no way invalidate those proceedings.

ORDER

The order of the administrative Law Judge dated at New York, New York, on 15 September 1971, is AFFIRMED.

C.R. BENDER
Admiral U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 7th day of February 1973.

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